Victoria Jayaseele Martin v Majlis Agama Islam Wilayah Persekutuan & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01–242 OF 2011
ABU SAMAH, ALIZATUL KHAIR AND AZIAH ALI JJCA
12 SEPTEMBER 2013

Statutory Interpretation — Subordinate legislation — Canons of construction — Whether subsidiary legislation repugnant to provisions of parent Act and ultra vires — Whether parent Act allowed 'any person' and not just Muslims to be admitted as peguam syarie — Whether Act would have explicitly said so if Parliament intended only Muslims to be admitted as peguam syarie — Administration of Islamic Law (Federal Territories) Act 1993 s 59(1)& (2) — Peguam Syarie Rules 1993 r 10

The issue in this appeal was whether that part of r 10 of the Peguam Syarie Rules 1993 ('the Rules') — made pursuant to s 59(2) of the Administration of Islamic Law (Federal Territories) Act 1993 ('the Act') — which imposed a condition that only a Muslim could be admitted and be allowed to practise as a peguam syarie was ultra vires s 59(1) of the Act. Section 59(1) provided that the first respondent ('the Majlis') 'Subject to subsection (2) … may admit any person having sufficient knowledge of Islamic Law to be Peguam Syarie to represent parties in any proceedings before the Syariah Court'. Section 59(2) provided that 'The Majlis may, with the approval of the Yang diPertuan Agong, make rules (a) to provide for the procedure, qualifications and fees for the admission of Peguam Syarie, and (b) to regulate, control and supervise the conduct of Peguam Syarie'. The Peguam Syarie Committee ('the committee') — established pursuant to r 3 of the Rules — was empowered to conduct examinations for applicants for peguam syarie, issue the Sijil Peguam Syarie and admit a person as a peguam syarie. The applicant, a non-Muslim, applied to the committee for admission as a peguam syarie. Instead of requiring the appellant to sit for the requisite examinations to obtain the Sijil Peguam Syarie, the committee refused to process her application solely on the ground she was not a Muslim. The appellant applied to the High Court for an order of certiorari to quash that decision and an order of mandamus to compel the respondent to receive and process her application. The appellant also sought declarations that that part of r 10 of the Rules that allowed only Muslims to be admitted as peguam syarie was ultra vires the Act and also void for contravening arts 5 and/or 10(1)(c) of the Federal Constitution. The High Court dismissed the appellant's application holding that: (a) because s 59(1) of the Act was subject to s 59(2), the Majlis had the power to make rules relating to the qualification for admission of persons as peguam syarie and that included the power to impose a condition that the applicant must be a Muslim;

and (b) the word 'qualifications' in s 59(2) of the Act was wide enough to include the condition that a peguam syarie must be a Muslim.

Held, allowing the appeal, setting aside the orders of the High Court, granting the orders of certiorari and mandamus and declaring that that part of r 10 of the Rules mandating that only Muslims could be admitted as peguam syarie was ultra vires:

(1) Rule 10 of the Rules which provided that a person may be admitted as a peguam syarie if he was a Muslim was clearly contrary to s 59(1) of the Act which did not limit the power of the Majlis to admit a person as a peguam syarie to Muslims only (see para 16).

(2) Section 59(1) expressly allowed the Majlis to admit any person having sufficient knowledge of Islamic Law to be a peguam syarie. In the absence of any definition, the words 'any person' in s 59(1) in their natural meaning must mean any person regardless of his or her religion. There was nothing in the Act to restrict the meaning of the words 'any person' to mean 'any Muslim'. It was naive to assume that any non-Muslim was incapable of acquiring sufficient knowledge of Islamic law. As a subject of learning, Islamic law was not the monopoly of Muslims (see para 14).

(3) The Rules made under s 59(2) of the Act were a form of subsidiary legislation and they did not stand on equal footing as the parent Act and could not override the parent Act. The power of the Majlis to admit any person having sufficient knowledge of Islamic law as a peguam syarie was conferred by the parent Act. The Majlis could not by way of subsidiary legislation, make rules inconsistent with or contrary to s 59(1) (see paras 15–16).

(4) The phrase 'subject to subsection (2)' in s 59(1) of the Act did not make s 59(1) subservient to s 59(2) because s 59(2) itself did not take away or curtail the power of the Majlis to admit any person having sufficient knowledge of Islamic law as a peguam syarie. Section 59(2) was merely an enabling provision which the Legislature had conferred on the Majlis to make rules regulating the procedure and qualification for admission of peguam syarie (see para 16).

(5) The amendment to s 59(1) by Act A931 did not alter the meaning of the words 'any person' in s 59(1) or curtail the power of the Majlis to admit any person having sufficient knowledge of Islamic law as a peguam syarie. The amendment, in fact, widened the power of the Majlis to admit a peguam syarie. The word 'persons' in the original s 59(1) had been amended to 'any person' in the amended s 59(1) whilst a new sub-s (3) widened the power of the Majlis by allowing it to exempt any member of the Judicial and Legal Services or any person appointed under s 3 of the Legal Aid Act 1971 from the provisions of s 59. Thus any such person

could appear in the Shariah Court on behalf of any party upon being granted the exemption by the Majlis (see paras 17–18).

(6) That the words 'any person' in s 59(1) included any person regardless of his religion was not a view that was contrary to the whole scheme of the Act. The Act did not close the doors for non-Muslims having sufficient knowledge of Islamic law to appear in the Shariah Court. There were non-Muslims in the Judicial and Legal Services. Similarly, a person appointed under s 3 of the Legal Aid Act 1971 need not be a Muslim. Yet, those two categories of persons need not have to be a peguam syarie in order to appear in the Shariah Court if the Majlis, under s 59(3), exercised its discretion to exempt them from the provisions of s 59 (see paras 19–20).

(7) If the intention and purpose of s 59 of the Act was to admit only Muslims having sufficient knowledge of Islamic law as a peguam syarie the Legislature would, instead of using the words 'any person', have used the words 'any Muslim' or words to that effect in s 59(1). The duty of the court was to expound the language of the Act in accordance with the settled rules of construction (see paras 21–22).

[Bahasa Malaysia summary

Isu rayuan ini adalah sama ada bahagian pada k 10 Kaedah-Kaedah Peguam Syarie 1993 ('Kaedah tersebut') — yang dibuat menurut s 59(2) Akta Pentadbiran Undang-Undang Islam (Wilayah-Wilayah Pesekutuan) 1993 ('Akta tersebut') — yang mengenakan syarat bahawa hanya seorang Muslim boleh diterima masuk dan dibenarkan beramal sebagai peguam syarie adalah ultra vires s 59(1) Akta tersebut. Seksyen 59(1) memperuntukkan bahawa responden pertama ('Majlis tersebut') '[s]ubject to subsection (2) … may admit any person having sufficient knowledge of Islamic Law to be Peguam Syarie to represent parties in any proceedings before the Syariah Court'. Seksyen 59(2) memperuntukkan bahawa '[t]he Majlis may, with the approval of the Yang diPertuan Agong, make rules (a) to provide for the procedure, qualifications and fees for the admission of Peguam Syarie, and (b) to regulate, control and supervise the conduct of Peguam Syarie'. Jawatankuasa Peguam Syarie ('jawatankuasa tersebut') — yang ditubuhkan menurut k 3 Kaedah tersebut — telah diberi kuasa untuk melaksanakan pemeriksaan untuk pemohon-pemohon untuk peguam syarie, mengeluarkan Sijil Peguam Syarie dan menerima masuk seseorang sebagai peguam syarie. Pemohon, seorang bukan Islam, telah memohon kepada jawatankuasa tersebut untuk diterima masuk sebagai peguam syarie. Perayu yang sepatutnya dikehendaki menduduki peperiksaan yang perlu untuk memperoleh Sijil Peguam Syarie, telah ditolak pemprosesan permohonannya oleh jawatankuasa tersebut semata-mata atas alasan dia bukan seorang Muslim. Perayu telah memohon kepada Mahkamah Tinggi untuk perintah certiorari bagi membatalkan keputusan tersebut dan perintah mandamus untuk mendesak responden

menerima dan memproses permohonannya. Perayu juga memohon deklarasi bahawa bahagian pada k 10 Kaedah tersebut yang membenarkan hanya orang Muslim diterima masuk sebagai peguam syarie adalah *ultra vires* Akta tersebut dan juga terbatal kerana bertentangan dengan perkara 5 dan/atau 10(1)(c) Perlembagaan Persekutuan. Mahkamah Tinggi telah menolak permohonan perayu dengan memutuskan bahawa: (a) kerana s 59(1) Akta tersebut adalah tertakluk kepada s 59(2), Majlis mempunyai kuasa untuk membuat kaedah-kaedah berkaitan kelayakan untuk penerimaan masuk seseorang sebagai peguam syarie dan ia termasuklah kuasa untuk mengenakan syarat bahawa pemohon hendaklah seorang Muslim; dan (b) perkataan 'qualifications' dalam s 59(2) Akta tersebut adalah luas untuk meliputi syarat bahawa seorang peguam syarie hendaklah seorang Muslim.

Diputuskan, membenarkan rayuan, mengetepikan perintah-perintah Mahkamah Tinggi, membenarkan perintah-perintah certiorari dan mandamus dan mengisytiharkan bahawa bahagian k 10 Kaedah tersebut yang memberi mandat bahawa hanya seorang Muslim boleh diterima masuk sebagai peguam syarie adalah ultra vires:

(1) Kaedah 10 Kaedah tersebut yang memperuntukkan bahawa seseorang boleh diterima masuk sebagai peguam syarie jika dia adalah seorang Muslim jelas bertentangan dengan s 59(1) Akta tersebut yang tidak mengehadkan kuasa Majlis tersebut untuk menerima masuk seseorang sebagai peguam syarie kepada orang Muslim sahaja (lihat perenggan 16).

(2) Seksyen 59(1) jelas membenarkan Majlis tersebut menerima masuk 'any person having sufficient knowledge of Islamic Law to be a Peguam Syarie'. Tanpa apa-apa definisi, perkataan-perkataan 'any person' dalam s 59(1) dalam maksud semula jadi hendaklah bermaksud mana-mana orang tanpa mengira agamanya. Tiada apa-apa dalam Akta tersebut yang menghalang maksud perktaan-perkataan 'any person' untuk bermaksud 'any Muslim'. Adalah naif untuk beranggapan bahawa mana-mana orang yang bukan Muslim tidak berkemampuan memperoleh pengetahuan mengenai undang-undang Islam yang mencukupi. Sebagai subjek pembelajaran, undang-undang Islam bukan monopoli orang Muslim (lihat perenggan 14).

(3) Kaedah tersebut yang dibuat di bawah s 59(2) Akta tersebut membentuk perundangan subsidiari dan tidak mempunyai taraf sama seperti Akta induk dan tidak boleh mengatasi Akta induk. Kuasa Majlis tersebut untuk menerima masuk seseorang yang mempunyai pengetahuan yang mencukupi tentang undang-undang Islam sebagai peguam syarie telah diberikan oleh Akta induk. Majlis tersebut tidak boleh melalui perundangan subsidiari, membuat undang-undang yang tidak konsisten atau bertentangan dengan s 59(1) (lihat perenggan 15–16).

(4) Ungkapan 'subject to subsection (2)' dalam s 59(1) Akta tersebut tidak

menjadikan s 59(1) kurang penting daripada s 59(2) kerana s 59(2) dengan sendirinya tidak melenyapkan atau mengehadkan kuasa Majlis tersebut untuk menerima masuk mana-mana orang yang mempunyai pengetahuan mencukupi tentang undang-undang Islam sebagai peguam syarie. Seksyen 59(2) hanyalah peruntukan yang membolehkan di mana badan perundangan telah memberikan kepada Majlis tersebut untuk membuat kaedah-kaedah bagi mengawal selia prosedur dan kelayakan penerimaan masuk peguam syarie (lihat perenggan 16).

(5) Pindaan kepada s 59(1) oleh Akta A931 tidak mengubah maksud perkataan-perkataan 'any person' dalam s 59(1) atau mengehadkan kuasa Majlis tersebut untuk menerima masuk mana-mana orang yang mempunyai pengetahuan mencukupi tentang undang-undang Islam sebagai peguam syarie. Bahkan pindaan tersebut meluaskan kuasa Majlis tersebut untuk menerima masuk seorang peguam syarie. Perkataan 'persons' dalam s 59(1) yang asal telah dipinda kepada 'any person' dalam s 59(1) yang dipinda manakala sub-s (3) meluaskan kuasa Majlis tersebut dengan membenarkannya untuk mengecualikan 'any member' Perkhidmatan Kehakiman dan Perundangan atau 'any person' yang dilantik di bawah s 3 Akta Bantuan Guaman 1971 daripada peruntukan s 59. Oleh itu mana-mana orang pun boleh hadir di Mahkamah Syariah bagi mana-mana pihak setelah diberikan pengecualian oleh Majlis (lihat perenggan 17–18).

(6) Perkataan-perkataan 'any person' dalam s 59(1) termasuklah mana-mana orang tanpa mengira agamanya bukan pandangan yang bertentangan dengan keseluruhan skema Akta tersebut. Akta tersebut tidak menghalang yang bukan Muslim berpengetahuan undang-undang Islam untuk hadir di Mahkamah Syariah. Terdapat orang bukan Muslim dalam perkhidmatan Kehakiman dan Perundangan. Begitu juga, seseorang yang dilantik di bawah s 3 Akta Bantuan Guaman 1971 tidak perlulah seorang Muslim. Bahkan, kedua-dua kategori tersebut tidak perlulah seorang peguam syarie bagi tujuan hadir di Mahkamah Syariah jika Majlis tersebut, di bawah s 59(3) menggunakan budi bicaranya untuk mengecualikan mereka daripada peruntukan s 59 (lihat perenggan 19–20).

(7) Jika niat dan tujuan s 59 Akta tersebut adalah untuk menerima masuk hanya orang Muslim yang mempunyai pengetahuan undang-undang Islam yang mencukupi sebagai peguam syarie badan perundangan akan, sebaliknya menggunakan perkataan-perkataan 'any person', dengan menggunakan perkataan-perkataan 'any Muslim atau perkataan-perkataan yang mempunyai kesan sama dalam s 59(1). Kewajipan mahkamah adalah untuk menjelaskan bahasa Akta tersebut menurut kaedah-kaedah tetap tafsiran pembentukan yang tetap (lihat perenggan 21–22).]

Notes

For cases on canons of construction, see 11 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2085–2086.

Cases referred to

Becke v Smith (1836) 2 M&W 191 (refd)
Capper v Baldwin [1965] 2 QB 53, QBD (refd)
NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd [1987] 1 MLJ 39, SC (refd)
R v Branbury (inhabitants) (1834) 1 Ad & El 136 (refd)

Legislation referred to

Administration of Islamic Law (Federal Territories) Act 1993 ss 4(1), 10, 32, 41(2)(b)(ii), 42, 43(2)(b)(ii), 59, 59(1), 59(2), 59(3), 59(4)
Federal Constitution arts 5, 10(1), 10(1)(c)
Interpretation Acts 1948 and 1967 ss 2, 17A
Legal Aid Act 1971 s 3
Peguam Syarie Rules 1993 rr 3, 7, 10, 10(e)
Rules of the High Court 1980 O 53

Appeal from: Application for Judicial Review No RK4/25–319 of 2009 (High Court, Kuala Lumpur)

Ranjit Singh (Jamie Wong with him) (Ranjit Singh & Yeoh) for the appellant.
Sulaiman bin Abdullah (Zulkifly Che Yong and Nur Elyani bt Noorkhuszairy with him) (Zulkifli Yong Azmi & Co) for the first respondent.
Arik Sanusi bin Yeop Johari (Norhisham bin Ismail with him) (Attorney General's Chambers) for the second respondent.

Abu Samah JCA:

[1] This is an appeal by the appellant against the decision of the Kuala Lumpur High Court dismissing her application for judicial review pursuant to O 53 of the Rules of the High Court 1980 for the following reliefs:

(a) a declaration that that part of r 10 of the Peguam Syarie Rules 1993 mandating that only Muslims can be admitted as 'peguam syarie' is ultra vires the Administration of Islamic Law (Federal Territories) Act 1993 ('the Act');

(b) a declaration that that part of r 10 of the Peguam Syarie Rules 1993 mandating that only Muslims can be admitted as 'peguam syarie' is in contravention of art 5 and/or art 10(1)(c) of the Federal Constitution and is as a consequence void;

(c) an order of certiorari to quash the decision of the respondent refusing to process the appellant's application to be admitted as 'peguam syarie'; and

(d) an order of mandamus to compel the respondent to receive and process the appellant's application to be admitted as 'peguam syarie' without regard to the fact that the appellant is a non-Muslim.

[2] Leave to commence judicial review against the first respondent was granted by the High Court on 14 May 2010. However the learned High Court judge who heard the substantive application for judicial review dismissed the appellant's application without costs on the ground that the Majlis Agama Islam Wilayah Persekutuan ('the Majlis') is empowered under s 59(2) of the Act to make rules relating to qualification for admission of persons as *peguam syarie*, including the power to impose a condition that the applicant must be a Muslim. The opening words in s 59(1) of the Act which begins with the phrase 'Subject to subsection (2)' means that the power of the Majlis to admit any person having sufficient knowledge of Islamic law must be subject to the rules made under s 59(2) of the Act. The word 'qualification', in s 59(2) of the Act is wide enough to empower the Majlis to impose a condition that a *peguam syarie* must be a Muslim. The learned judge at paras 17 and 21 of her judgment said:

> 17. Whether or not the imposition of the requirement that a person must be a Muslim is within the power of Majlis must therefore depend on the meaning of the word *qualification* used in that section. If the legislature had intended that knowledge of Islamic Law per se is sufficient then s 59(1) would have been enacted to read instead, 'The Majlis shall admit any person having sufficient knowledge of Islamic Law …'. Since the opening words of s 59(1) begin with 'Subject to subsection (2)', it is clear that the *qualification of a person with sufficient knowledge of Islamic Law* in that s 59(1) is subject to the power given to the Majlis in sub-s (2). That being the case, I hold that the Majlis is empowered by virtue of s 59(2) to regulate the *qualification* of a *peguam syarie*.
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> 21. The power delegated to the Majlis is sufficiently wide to enable the Majlis to enact a condition that an applicant for admission as *peguam syarie* must be a Muslim, in addition to having sufficient knowledge of Islamic Law.

[3] Section 59 of the Act provides:

> (1) Subject to subsection (2), the Majlis may admit any person having sufficient knowledge of Islamic law to be Peguam Syarie to represent parties in any proceedings before the Syariah Court.
>
> (2) The Majlis may, with the approval of the Yang di Pertuan Agong, make rules —

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(a) To provide for the procedure, qualifications and fees for the admission of Peguam Syarie, and

(b) To regulate, control and supervise the conduct of Peguam Syarie.

The Majlis, in exercise of its powers under s 59(2) of the Act had in 1993 passed B the rules known as Peguam Syarie Rules 1993.

[4] The appellant, a non-Muslim, applied to the Peguam Syarie Committee, for admission as a *peguam syarie*. The Peguam Syarie Committee is established pursuant to r 3 of the Peguam Syarie Rules 1993 ('the Rules'), whose functions C are set out in r 7, which includes, the power to conduct the examination of applicants for *peguam syarie*, to admit a person as a *peguam syarie* and to issue the *peguam syarie* certificate.

[5] On 9 September 2009 the committee purportedly acting on behalf of the D Majlis decided not to process the appellant's application on the sole ground that she is not a Muslim. The letter to the appellant dated 9 September 2009, signed by the chairman of the committee states:

> E Dukacita dimaklumkan bahawa pihak kami tidak dapat memproses permohonan pihak puan kerana mengikut Kaedah-Kaedah Peguam Syarie 1993 (P.U (A) 408/1993) syarat utama bagi seseorang untuk memohon dan beramal sebagai Peguam Syarie di Wilayah Persekutuan adalah pemohon tersebut hendaklah seseorang yang berugama Islam.

F **[6]** The condition that a *peguam syarie* must be a Muslim is found in r 10 of the 1993 Rules which states:

> 10 A person may be admitted to be a Peguam Syarie if he —
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> G (a) (i) is a Muslim and has passed the final examinations which leads to the certificate of a bachelor's degree in Syariah from any university or any Islamic educational institution recognised by the Government of Malaysia; or
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> (ii) is a Muslim member of the judicial and legal service of the H Federation; or
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> (iii) is a Muslim advocate and solicitor enrolled under the Legal Profession Act 1976; or
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> (iv) has served as a Syariah Judge or as a Kathi with any State Government in Malaysia for a period of not less than seven years;

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(b) has attained the age of twenty-one years;

(c) is of good behaviour and —

(i) has never been convicted in Malaysia or in any other place of any criminal offence;

(ii) has never been adjudged a bankrupt;

(d) is a Malaysian citizen; and

(e) as an advocate and solicitor, has passed the *Sijil Peguam Syarie* examination.

[7] It is not in dispute that the appellant had not passed the examination for the certificate of *peguam syarie* nor being asked to sit for such examination. But the refusal to process the application was based solely on the ground that the appellant is not a Muslim and not on the ground that she had not passed the examination for the certificate of *peguam syarie*.

[8] The issue before us is whether that part of r 10 which imposes a condition that only a Muslim can be admitted and be allowed to practice as a *peguam syarie* is ultra vires s 59(1) of the Act. This is a matter of construction of s 59(1) and 59(2) of the Act. It is not a question of whether a non-Muslim can, under Shariah law, be admitted as a *peguam syarie*. It is also not a question of whether the Shariah Court has jurisdiction over non-Muslims. It is simply a question of whether that condition in r 10 is ultra vires s 59(1) of the Act. The consequential reliefs in the form of certiorari to quash the decision of the first respondent in refusing to process her application and mandamus to compel the first respondent to process her application would only be relevant if the appellant is successful in her application for the declarations.

[9] It must be stressed here that this is *not* an application to compel the first respondent to *admit* the appellant as a *peguam syarie* solely on the basis of her application. She had not sat nor passed the *Sijil Peguam Syarie* Examination, a fact which is conceded by learned counsel for the appellant. An applicant will not be admitted as a *peguam syarie* if he or she had not passed the *Sijil* Syarie Examination (see r 10(e)).

[10] Learned counsel for the appellant contended that the condition in r 10 that only a Muslim may be admitted as a *peguam syarie* is ultra vires s 59(1) as that section allows *any person with sufficient knowledge of Islamic Law* to be admitted as a *peguam syarie*. A person's faith or religion is not a *sine qua non* for admission as a *peguam syarie* under s 59(1) of the Act.

[11] Dato' Hj Sulaiman bin Abdullah, learned counsel for the first respondent contended that the Legislature, in its wisdom, had delegated the power to the Majlis to make rules regarding the qualification of a person for admission as a *peguam syarie* as the Majlis is the proper body entrusted under the Act to advise the Yang Di Pertuan Agong on matters relating to the religion of Islam (s 4(1) of the Act). The words, 'Subject to subsection (2)' in s 59(1) of the Act means that the power of the Majlis to admit a person as a *peguam syarie* is subject to the rules made under s 59(2). Such power must be exercised in accordance with r 10 of the Peguam Syarie Rules 1993. It is a basic requirement that a *peguam syarie* must be a Muslim as the Shariah Court has no jurisdiction over non-Muslims. For instance, the Shariah Court may be confronted with a jurisdictional issue if a *peguam syarie*, being a non-Muslim, commits contempt of court. Therefore the court must look at the Act as a whole and adopt a purposive approach in the interpretation of s 59, consistent with s 17A of the Interpretation Acts 1948 and 1967.

[12] Learned senior federal counsel, Dr Arik Sanusi, for the second respondent pointed out that the words, 'Subject to subsection (2)' were introduced into the current s 59(1) of the Act by Act A931 in 1995. The original section s 59(1) did not contain the words 'Subject to subsection (2)'. The intention of the amendment was to make it clear that the power of the Majlis to admit a *peguam syarie* must be exercised in accordance with the rules made under s 59(2) including the qualification that the applicant must be a Muslim.

[13] The original s 59 prior to its amendment reads:

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> (1) The Majlis may, on payment of the prescribed fee, admit persons having sufficient knowledge of Islamic Law to be *Peguam Syarie* to represent parties in any proceedings before any Syariah Court.
>
> (2) The Majlis may, with approval of the Yang di-Pertuan Agong, make rules —
>
> (a) to provide for the procedure, qualifications and fees for the admission of *Peguam Syarie*; and
>
> (b) to regulate, control, and supervise the conduct of *Peguam Syarie*.
>
> (3) Notwithstanding anything contained in any other written law, no person other than a *Peguam Syarie* shall be entitled to appear in any Syariah Court on behalf of any party to any proceedings before it.

[14] We had examined the Act in its entirety. In our view s 59(1) expressly allows the Majlis to admit any person having sufficient knowledge of Islamic law to be a *peguam syarie*. Section 59(1) in its present form does not delimit the

power of the Majlis to admit a person as a *peguam syarie* only to Muslims. In the absence of any definition, the words 'any person' in s 59(1) in their natural meaning must mean any person, regardless of his or her religion. There is nothing in the Act to restrict the meaning of the words 'any person' to mean 'any Muslim'. Thus, any person, with sufficient knowledge of Islamic law may under s 59(1) be admitted as a *peguam syarie* at the discretion of the Majlis. Even being a Muslim per se, is not sufficient to be admitted as a *peguam syarie*. He must be a Muslim with sufficient knowledge of Islamic law. It is not the function of the court to question why s 59(1) was drafted as such? It is naive to assume that any non-Muslim is incapable of acquiring sufficient knowledge of Islamic law. It is common knowledge that Islamic Law, as a subject of learning is not the monopoly of Muslims.

There is no prohibition for non-Muslims to acquire knowledge of Islamic law.

[15] Subsection 2 of s 59 of the Act is an enabling provision, which empowers the Majlis, with the approval of the Yang di Pertuan Agong, to make rules:

(a) to provide for the procedure, qualifications and fees for admission of *peguam syarie*; and

(b) to regulate, control and supervise the conduct of *peguam syarie*.

By definition, the Rules made under s 59(2) are a form of subsidiary legislation (see s 2 of the Interpretation Acts 1948 and 1967). They do not stand on equal footing as the parent Act and cannot override the parent Act. The power of the Majlis to admit any person having sufficient knowledge of Islamic law as a *peguam syarie* is conferred by the parent Act itself.

[16] The phrase, 'Subject to subsection (2)' in s 59(1) of the Act does not make s 59(1) subservient to s 59(2), as contended by the respondents. This is because s 59(2) itself does not take away or curtail the power of the Majlis to admit any person having sufficient knowledge of Islamic law as a *peguam syarie*. Section 59(2) is merely an enabling provision, which the Legislature has conferred on the Majlis to make rules, with the approval of the Yang Di Pertuan Agong, regulating the procedure and qualification for admission of *peguam syarie*. The Majlis cannot by way of a subsidiary legislation, make rules inconsistent with or contrary to s 59(1). In our view r 10 of the Peguam Syarie Rules 1993, which provides that a person may be admitted as a *peguam syarie* if he is a Muslim is clearly contrary to s 59(1) which does not limit the power of the Majlis to admit a person as a *peguam syarie* to Muslims only. It is ultra vires s 59(1) of the Act.

[17] In our view the amendment to s 59(1) by Act A931 did not alter the meaning of the words 'any person' in s 59(1) or curtail the power of the Majlis to admit any person having sufficient knowledge of Islamic law as a *peguam*

syarie. The explanatory statement to cl 4 of the bill relating to Administration of Islamic Law (Federal Territories) (Amendment) Act 1995 states:

> 4. *Clause 4* seeks to substitute section 59 of the Act with a new section 59 to enable the Majlis to admit Peguam Syarie to represent parties in proceedings before the Syariah Courts and to exempt certain persons from the provisions relating to admission of Peguam Syarie in the Syariah Courts.

The explanatory statement is not of much help. The first part of it is superfluous, as the Majlis had already been given the power to admit *peguam syarie* under the old s 59(1).

[18] The explanatory statement also makes no reference to a person's faith. The amendment in fact widens the power of the Majlis to admit a *peguam syarie*. The word 'persons' in the original s 59(1) had been amended to 'any person', in the new s 59(1). The old sub-s (3) of s 59 had been amended and renumbered as sub-s 4 and a new sub-s (3) was introduced. This new sub-s 3 widens the power of the Majlis by allowing it to exempt any member of the judicial and legal service or any person appointed under s 3 of the Legal Aid Act 1971 from the provisions of s 59. There was no such provision under the old s 59. Thus, any such person may now appear in the Shariah Court on behalf of any party, upon being granted the exemption by the Majlis.

[19] Our view that the words 'any person' in s 59(1) include any person regardless of his religion is not contrary to the whole scheme of the Act. The Act does not close the doors for non-Muslims having sufficient knowledge of Islamic law to appear in Shariah Court. Section 59(3) gives the Majlis the discretion to exempt:

(a) any member of the judicial and legal service; or

(b) any person appointed under s 3 of the Legal Aid Act 1971;

from the provision of s 59 itself. This means that any member of the judicial and legal service or any person appointed under s 3 of the Legal Aid Act 1971 may appear in Shariah Court if granted the exemption.

[20] It is a known fact that there are non-Muslims members in the judicial and legal service. Similarly, a person appointed under s 3 of the Legal Aid Act 1971 need not be a Muslim. These two categories of persons need not have to be a *peguam syarie* in order to appear in the Shariah Court. The only restriction is that they have to obtain the necessary exemption from the Majlis.

[21] We note that the word 'Muslim' has not been used consistently throughout the Act as a qualification on matters relating to appointment, admission of or membership of a body, committee, council or appointment of judges of the Shariah Court. For instance, members of the Majlis (s 10) and

members of the Shariah Appeal Court (s 42) must be Muslims. The word Muslim is conspicuously absent in ss 41(2)(b)(ii) and 43(2)(b)(ii). A person who is a citizen and learned in Islamic law may be appointed as a Chief Shariah Judge under s 41(2)(b)(ii). A person who is a citizen and learned in Islamic law may be appointed as a judge of the Shariah High Court under s 43(2)(b)(ii). Section 59(1) does not use the word 'Muslim' but uses the words 'any person'. Section 32, which provides for the appointment of *Mufti* and Deputy *Mufti* does not use the word 'Muslim' but uses the words 'fit and proper persons'. That was the way the Act was drafted and passed by the Legislature. Why did the Legislature use the words 'any person' instead of the words 'any Muslim' or words to that effect in s 59(1) of the Act if the intention and purpose of s 59 is to admit only Muslims having sufficient knowledge of Islamic law as a *peguam syarie*? If that was the intention and purpose of the Act, it must say so in clear and unequivocal terms.

[22] The rule of construction is 'to intend the legislature to have meant what they have actually expressed' (*R v Banbury (inhabitants)* (1834) 1 Ad & El 136, per Lord Parker at p 142) and that 'the intention of Parliament must be deduced from the language used' (*Capper v Baldwin* [1965] 2 QB 53 at p 61. The Supreme Court (as it then was) in *NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd* [1987] 1 MLJ 39 reminded the judges that they are not legislators. The duty of the court is to expound the language of the Act in accordance with the settled rules of construction. The court has nothing to do with the policy of any Act, which it may be called upon to interpret. That may be a matter for private judgment. The onus of showing that the words do not mean what they say lies heavily on the party who alleges it. He must, as Parke B stressed in *Becke v Smith* (1836) 2 M&W 191 at p 195, advance something which clearly shows that the grammatical construction would be repugnant to the intention of the Act or lead to some manifest absurdity. The respondents had not convinced us that it was the clear intention of the Act to admit only Muslims with sufficient knowledge of Islamic law as a *peguam syarie*.

[23] For the aforesaid reasons, we allow the appeal by the appellant, set aside the orders of the learned judge and grant the declaration sought as in para (a) and the consequential orders as in paras (c)–(d) of the appellant's application. In view of the abovesaid decision, it would not be necessary for us to decide whether r 10 is unconstitutional or ultra vires art 5 and/or art 10(1) of the Federal Constitution.

[24] By consent we made no order as to costs.

Appeal allowed, orders of the High Court set aside, orders of certiorari and mandamus granted and part of r 10 of the Rules mandating that only Muslims could be admitted as peguam syarie declared ultra vires.

Reported by Ashok Kumar